IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 73

WESTCHESTER FIRE INSURANCE COMPANY,
Petitioner,

vs.

WILLIAM M. HANLEY AND LILA V. HANLEY,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

HAROLD S. SHAWD
WARNER, NORCROSS & JUDD
Business Address:
900 Michigan Trust Bldg.
Grand Rapids 2, Michigan

JOHN T. RYAN
RYAN AND McQUILLAN
Business Address:
St. Joseph Sav. & Loan Bldg.
St. Joseph, Michigan

Attorneys for Respondents

LEGAL BRIEF AND RECORD COMPANY, 1111 MONROE AVENUE, N.W.
GRAND RAPIDS 5, MICHIGAN — PHONE GL 8-8326

INDEX

	Page
Opinions Below	1
Question Presented	2
Statement of Case	2
Reasons for Denying the Writ	4
Conclusion	15

CITATIONS

Cases:

	Page
Alma State Savings Bank vs. Springfield Fire & Marine Ins. Co., 268 Mich. 631, 256 N.W. 573 (1934)	6
Bernadich vs. Bernadich, 287 Mich. 137, 283 N.W. 5 (1938)	6
Cardwell vs. United States, 186 F. 2d 382, (C.C.A. 5 1951)	8
Chaachou vs. American Central Insurance Company, 241 F. 2d 889 (C.C.A. 5 1957)	5, 6
Cooper vs. Fireman's Ins. Co., 148 F. 2d 337, (C.C.A. 6 1945)	7, 9
Dick vs. New York Life Ins. Co., 359 U. S. 437 (1959)	11
Dill vs. Scuka, 279 F. 2d 145 (C.C.A. 3 1960)	12
Ford Motor Co. vs. Mondragon, 271 F. 2d 342 (C.C.A. 8 1959)	12
Lovas vs. General Motors Corp., 212 F. 2d 805 (C.C.A. 6 1954)	10
Metropolitan Coal Co. vs. Johnson, 265 F. 2d 173 (C.C.A. 1 1959)	12
Rossman vs. Hutchinson, 289 Mich. 577 (1939)	7
Texas Company vs. Savoie, 240 F. 2d 674 (C.C.A. 5 1957)	8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 737

WESTCHESTER FIRE INSURANCE COMPANY,
Petitioner,

vs.

WILLIAM M. HANLEY AND LILY V. HANLEY,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

To the Honorable; The Chief Justice and the Associate Justices of the Supreme Court of the United States:

William M. Hanley and Lily V. Hanley, respondents, pray that the petition for a writ of certiorari in the above-entitled cause be denied and respectfully submit the following brief in opposition to said petition.

OPINIONS BELOW

The opinion of the District Court is reported at 23 F. R. D. 640, and will be found at page 217a of the printed record. The opinion of the Court of Appeals has not yet been officially reported and is set out in the Appendix to the Petition.

QUESTION PRESENTED

We believe that the question stated by petitioner is not before the Court in this case. We believe that the only question presented by this case on the issue of "false swearing" is as follows:

> "Does the record in this case reveal as a matter of law that there was no factual question upon the issue of 'false swearing' to be properly submitted to the jury."

STATEMENT OF CASE

Petitioner's statement of the case is drafted so as to present the question it has stated. Because we believe the question as stated by petitioner is not here presented a statement of the case by respondents is necessary.

Petitioner, through its agent Allen on May 26, 1954, issued an insurance policy covering respondents' home located on a bluff overlooking Lake Michigan. On September 9, 1954, petitioner, through its agent Allen, added an "all physical loss" coverage by endorsement to this policy. By the terms of the policy as endorsed respondents were insured against all physical loss with the exception of certain exclusions specifically set forth in the policy (R. 23a) (Appellant's Appendix filed in Court of Appeals).

On October 16 or 17, 1954, a sudden landslide occurred in which a large portion of the bluff in the rear of respondents' home broke away, leaving the home on the new edge of the bluff.

There were four principal issues at the trial, one of which is presented here, and two others of which, although now settled and not here presented, have bearing on the issue of false swearing. The first of these two issues was whether the fall of the bluff was the result of the cutting into the bluff by the high water and waves of Lake Michigan (an excluded peril) or whether it was a landslide caused by water seepage following unusually heavy rains that fell for a period of several days prior to the night of the fall (a peril within the coverage of the policy). (Court of Appeals opinion, Petition Appendix p. 5a). The jury determined that the cause of the fall was not erosion, but was caused by the unusually heavy precipita-

tion just before the fall. (Court of Appeals opinion, Petition Appendix p. 6a).

The second of these issues was whether respondents had fraudulently concealed knowledge of conditions that would have affected petitioner's acceptance of the risks covered. On this issue the testimony of petitioner's agent, who sold the insurance, established that at the time he sold the policy to respondents in May, 1954, he was familiar with the erosion problem along the shore of Lake Michigan in the vicinity of respondents' home. (R. 35b) (Appellees' Appendix filed in Court of Appeals). The jury determined that there had been no fraudulent concealment. In affirming, the Court of Appeals said (Court of Appeals Opinion, Petition Appendix p. 10a):

> "It is true, also that on the question of materiality of the concealment of any such condition, the jury's verdict was a finding that the fall of the bluff in question was from a different cause than the condition of peril allegedly concealed from the defendant."

With regard to the issue of "false swearing" which is here presented Mr. Hanley was examined under oath by petitioner on January 17, 1955, and again at the trial of the case. The issue of false swearing occasioned by (in the words of the Court of Appeals, Petition Appendix p. 8a) "what, to some minds, might appear as discrepancies between what he said under oath in the examination of January, 1955, and at the trial, and his strong averments in his letter to Governor Williams and in his testimony before the sub-committee" was submitted to the jury upon instructions (Court of Appeals Opinion, Petition Appendix p. 9a):

> "That if they found as a fact that the plaintiffs, or either of them, knowingly or wilfully, with intent to defraud the defendant, concealed facts which affected the risk assumed, or made false statements in their proof of loss, or made false statements in the sworn testimony of William M. Hanley given in support of the proof of loss, relative to any material matters, then such false statements would constitute fraud and false swearing within the meaning of the policy of insurance and would void the policy."

The contention that "false swearing" was established as a matter of law was raised by petitioner in its motion for judgment notwithstanding the verdict and new trial. The District Court in denying these motions stated (R. 241a) (Appellant's Appendix filed in Court of Appeals):

> "An examination of the transcript of the proceedings in the course of the trial of this cause, including the evidence, the charge of the Court, and the argument of counsel, satisfies this Court that a fair trial was had, that the jury was fully apprised of the claims of the respective parties and the evidence in support therof, that the jury was properly instructed as to the law which should be applied to the evidence and the Court should state in conclusion that the verdict of the jury was exactly the conclusion which the Court would have reached had it been the finder of the facts."

The Court of Appeals in affirming noted the explanation of counsel regarding the alleged discrepancies and stated, "It is obvious that the jury was impressed with such explanation." The Court of Appeals then held (Court of Appeals Opinion, Petition Appendix p. 9a):

> "Notwithstanding that, if triers of the fact, we might have come to a different conclusion than the jury, we are satisfied that the trial court properly submitted these issues to the jury upon authority of this court's holding in the case of *Cooper v. Fireman's Ins. Co.*, 148 F. (2) 337."

REASONS FOR DENYING THE WRIT

This Court should refuse to review this case for the following reasons:

I. The question as stated by petitioner is not presented by this case.

II. The only question presented by this case is whether there was a sufficient factual question on the issue of "false swearing" to justify its submission to the jury, and this question is not proper for review in this Court.

I.

Petitioner in stating the question presented and in stating reasons for granting the writ has attributed to the Court of Appeals certain holdings which the Court of Appeals did not make. Petitioner contends that the Court (1) found that the insured was guilty of false swearing and that there was no evidence which would permit a jury reasonably to find otherwise; and (2) held that the Court was nevertheless compelled to follow Michigan law which requires that false swearing issues be submitted to a jury. An examination of the Court of Appeals opinion shows that the Court made neither of these alleged holdings. In addition, an examination of the opinion of the District Court shows that the trial court made neither of these alleged holdings.

First, with regard to the alleged finding that the insured was guilty of false swearing and that there was no evidence which would permit a jury reasonably to find otherwise, petitioner apparently draws its own conclusion as to the Court's holding stating (Petition, p. 9): "As the Court itself points out, Mr. Hanley at no time offered any explanation for his false swearing," thereby implying that the Court had found him guilty of "false swearing." What the Court of Appeals did say on this point (Court of Appeals Opinion, Petition Appendix p. 8a) is that:

> "Mr. Hanley at no time gave an explanation of *what, to some minds, might appear as discrepancies* between what he said under oath in the examination of January, 1955, and at the trial, and his strong averments in his letter to Governor Williams and in his testimony before the sub-committee."

The unwarranted conclusion by petitioner illustrates its misconception of what constitutes "false swearing" under Michigan law. A finding "of what, to some minds might appear as discrepancies" does not in itself constitute "false swearing" under Michigan law.

What constitutes "false swearing" so as to void an insurance policy is a substantive question to be decided by the law of Michigan. See *Chaachou vs. American Central*

Insurance Company, 241 F. 2d 889 (C.C.A. 5 1957) holding in effect that the elements necessary to prove false swearing are determined by the law of the State. The substantive law of Michigan, as properly stated by the Court of Appeals (Court of Appeals Opinion, Petition Appendix p. 9a), requires that:

> "In order to void a policy for fraud on false swearing, the false swearing must have been done with an actual intent to defraud the insurer. *Bernadich v. Bernadich*, 287 Mich. 137, 144, 283 N.W. 5; *Alma State Savings Bank v. Springfield Fire & Marine Ins. Co.*, 268 Mich. 631, 634, 256 N.W. 573; *Perkins v. Century Ins. Co.*, 303 Mich. 679, 7 N.W. (2) 106."

Contrary to the assertion by petitioner (Petition p. 14) the Court of Appeals decision did not "construe" the false swearing clause but merely properly applied Michigan substantive law to the "false swearing" issue.

Although petitioner does not directly contest the Court of Appeals determination of what constitutes "false swearing" under Michigan law (for the reason that the Michigan law is clear and uniform in this regard) the essence of its argument is that inconsistent statements alone constitute false swearing. Because of this a brief examination of the Michigan law is pertinent here.

In *Alma State Savings Bank vs. Springfield Fire & Marine Ins. Co.*, 268 Mich. 631, 256 N.W. 573, (1934) the Michigan Supreme Court stated at p. 634:

> "But, in order to avoid the policy, the false swearing must have been done with an actual intent to defraud the insurer."

The Court in this case was construing a false swearing clause virtually identical to that in petitioner's policy.

In *Bernadich vs. Bernadich*, 287 Mich. 137, 283 N.W. 5, (1938) the Court, in addition to reaffirming the actual intent requirement, stated at p. 143:

> "To sustain a defense of fraud because of misrepresentation or false statements in an insurance contract it must be shown that the insurer was prejudiced or damaged by such conduct."

In *Rossman vs. Hutchinson*, 289 Mich. 577 (1939) the Michigan Supreme Court said at p. 594:

> "There is no proof Joseph Hutchinson • • • had any 'actual fraudulent intent.' Fraud will not be presumed, but must be proved. *Steele v. Shaffer*, 241 Mich. 632; *Kralink v. Lang*, 187 Mich. 286; *Raymond v. McKenna*, 147 Mich. 35; *Brown v. Dean*, 52 Mich. 267; *Robert v. Estate of Morrin*, 27 Mich. 306. In the absence of proof, such 'actual fraudulent intent,' under the facts, must be taken as not existing."

Thus, Michigan substantive law requires that in addition to a finding that the statements were false (not merely "what, to some minds, might appear as discrepancies") there must be a finding that they were *material* and that they were made with an *actual intent* to defraud the insurer. None of these required elements were found to exist as a matter of law by either the Court of Appeals or the District Court. To the contrary, it is implicit in both opinions that the Courts felt factual questions were presented on this issue of "false swearing". (Court of Appeals Opinion, Petition Appendix pp. 9a, 10a) (District Court Opinion, R. pp. 224a, 225a, 226a, 241a, Appellant's Appendix to Court of Appeals).

Neither Court made a finding that a reasonable person could infer only one thing from Mr. Hanley's testimony, but to the contrary indicated that his testimony was subject to different reasonable inferences as to his intent. Both courts based their decision on this issue on *Cooper vs. Fireman's Ins. Co.*, 148 F. (2) 337 (C.C.A. 6 1945) where after stating the law of Michigan relative to "false swearing" the Court had stated at p. 338:

> "Even were we to concede that a reasonable inference might have been drawn from the facts that the excessive valuation was made with an intention to deceive the appellees, it does not necessarily follow that it precluded all other reasonable inferences. The appellant's counsel gave reasonable explanation for the figure used. The intention to deceive was denied both by him and the appellant. The insurance adjuster was acquainted with all of the circumstances of the

> case at the time the Proofs of Loss were prepared. It was equally within the competence of the jury to find that the misrepresentations were made as the result of an honest mistake as to the technical meaning of 'Sound Value': and in any event without an intention to deceive and defraud the appellee. The motion for directed verdict should have been denied and the case submitted."

In addition the Court of Appeals in its opinion (Petition Appendix, pp. 8a, 9a) noted that counsel for Mr. Hanley offered explanation of the alleged inconsistent statements and concluded that, "It is obvious that the jury was impressed with such explanation."

This case with regard to this issue is similar to *Cardwell vs. United States*, 186 F. 2d 382 (C.C.A. 5 1951). In that case an action was brought on a National Service Life Insurance Policy which the government alleged was reinstated because of fraudulent misrepresentations. The decedent had made false statements in his application and the trial court directed a verdict for defendant. The Court of Appeals in reversing stated at page 385:

> "There can be no doubt as to the falsity of the representations contained in the application for reinstatement and that action was taken by the government in reliance thereon. But it is not every false statement that will void an insurance policy. The representation must not only have been untrue, but it must have been in reference to a material matter and knowingly made with knowledge of its falsity and with intent to deceive. And when reasonable men may differ as to whether a representation was material or whether a false answer was made with intent to deceive, those questions must be submitted to the jury."

See also *Texas Company vs. Savoie*, 240 F. 2d 674 (C. C.A. 5 1957), certiorari denied 355 U. S. 840, where the Court stated at p. 675:

> "• • • even where there is no conflict in the evidence, if reasonable minds may fairly draw conflicting

> inferences from the same evidence, requiring different verdicts, the issue is for the jury to determine the correct inference."

Before this Court can decide the question stated by petitioner it must first find based on the record in the case that Mr. Hanley was guilty of false swearing as a matter of law and that the Court of Appeals so held.

Second, with regard to the alleged holding that the Court of Appeals felt compelled to submit false swearing issues to the jury regardless of the evidence, petitioner apparently draws this conclusion from the Court's quotation from *Cooper vs. Fireman's Ins. Co.*, supra, that "intent to defraud is a question of fact for the jury." Generally, of course, the question of intent is a factual question for determination by the jury. However, it seems clear from both opinions that unless different reasonable inferences might be drawn from the evidence a factual question is not raised and the issue would not have been submitted to the jury. *Cooper vs. Fireman's Ins. Co.*, supra.

Petitioner in a footnote to his statement of the question presented states "that a proper analysis of the Michigan law does not require such issues to be presented to the jury when reasonable men could have no doubt as to what the facts are." Respondents have never contended otherwise. In our brief to the Court of Appeals with regard to this issue we stated at p. 17:

> "It is submitted by plaintiffs' counsel that there is only one issue for this Honorable Court to decide in connection with this second question. That issue is this: Does the record reveal that as a matter of law plaintiff, William Hanley knowingly and wilfully made a false material statement or statements with the intention to deceive and defraud the defendant and did defendant rely on such a statement or statements to its detriment."

An examination of the record in the Court of Appeals shows that there was no dispute over this question, and in light of this it is difficult to see where any holding on it would be necessary, or warranted, and as noted above there is nothing in the Court of Appeals decision consid-

ered in its entirety that would warrant the conclusion that the Court did make a holding to this effect.

It is our position that there is no real conflict between Federal law and Michigan law on when the question should be submitted to the jury. Both Federal and Michigan law require that there be some question of fact arising either out of the evidence itself or out of the reasonable inferences that may be drawn therefrom. It is implicit in the opinions of both the Court of Appeals and the District Court that the elements of "intent" and "materiality" essential to constitute "false swearing" under Michigan law presented factual questions which were not answered by a mere showing of inconsistent statements by the insured.

The Court of Appeals was not called upon nor required to resolve an alleged conflict between Federal and Michigan law in this case because none in fact exists. In this respect the case is similar to *Lovas vs. General Motors Corp.*, 212 F. 2d 805 (C.C.A. 6 1954) to which petitioner also attributes to the Sixth Circuit a holding that State rather than Federal law must be followed on this question. In that case the Sixth Circuit did indicate that the law of Ohio was applicable to the question but then went on to state at page 807:

> "Certain principles are well settled under both state and federal law. In every case, before the evidence is left to the jury, there is a preliminary question for the judge whether there is any substantial evidence upon which a jury can properly proceed to find a verdict for the plaintiff, upon whom the burden of proof is imposed. A mere scintilla of evidence, or evidence of no probative value, is not enough to require the submission of an issue to the jury. Where the evidence is conflicting or contradictory, the court does not attempt to judge its weight or to judge the credibility of the witnesses giving such testimony. In considering a motion by the defendant for a directed verdict the Court assumes the truth of the evidence in support of the facts essential to the plaintiff's claim together with all the inferences that justifiably could be drawn therefrom. Where such evidence on an issue is so overwhelmingly against the plaintiff's conten-

> tion as to leave no room to doubt that a fact is not what the plaintiff claims it to be and such fact is essential to plaintiff's cause of action, the Court is authorized as a matter of law to direct a verdict for the defendant. But where uncertainty as to the facts arises from a conflict in the testimony, or because fairminded men will honestly draw different conclusions from undisputed facts, the question is not one of law but of fact to be settled by the jury."

We submit that this statement correctly reflects the Federal law on this question, which law on this point is substantially the same as Michigan law.

In the absence of such conflict between Federal and State law a decision by the Supreme Court on this case could have no precedent value whatsoever, and this Court has previously indicated that in a situation such as this they would not attempt to decide the question. In *Dick vs. New York Life Ins. Co.*, 359 U. S. 437 (1959) the Court had before it the question of whether the Court of Appeals for the Eighth Circuit properly held that it was error to submit an issue to a jury's determination. Under State law there was a presumption of accidental death which had the weight of affirmative evidence. This Court held at page 443:

> "These state rules determine when the evidence in a 'suicide' case is sufficient to go to a jury."

With regard to the issue alleged to be presented in the case at bar the Court said at pages 444, 445:

> "Lurking in this case is the question whether it is proper to apply a state or federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship. On this question, the lower courts are not in agreement. Compare *Rotte v. Pennsylvania Greyhound Lines*, 231 F. 2d 922; *Cooper v. Brown*, 126 F. 2d 874; *Lovas v. General Motors Corp.*, 212 F. 2d 805; with *Davis Frozen Foods v. Norfolk Southern R. Co.*, 204 F. 2d 839; *Reuter v. Eastern Air Lines*, 226 F. 2d 443; *Diederich v. American News Co.*, 128 F 2d

144. And see Morgan, Choice of law Governing Proof, 58 Harv. L. Rev. 153, 174, and 5 Moore's Federal Practice (2d Ed. 1951) § 38.10. But the question is not properly here for decision because, in the briefs and arguments in this Court, both parties assumed that the North Dakota standard applied. Moreover, although the Court of Appeals appears to have applied the state standard, that court did not discuss the issue. Under these circumstances, we will not reach out to decide this important question particularly where, in the context of this case, the two standards are substantially the same."

In commenting on the *Dick* case the Court of Appeals for the Eighth Circuit stated in *Ford Motor Co. vs. Mondragon*, 271 F. 2d 342 (C.C.A. 8 1959) at page 344:

"Our present case was tried by all parties on the basis that Iowa law controls. Under such circumstances, particularly where the state and federal standards are substantially alike, the Dick case advises that no determination be made on the question of the applicable law."

See also *Metropolitan Coal Co. vs. Johnson*, 265 F. 2d 173 (C.C.A. 1 1959) and *Dill vs. Scuka*, 279 F. 2d 145 (C. C.A. 3 1960) which state in effect that where there is no significant difference between the federal standard and the state standard it is neither necessary nor appropriate to determine the broad question of whether the standard for directing a verdict in federal court is to be federal or state.

Thus, before this Court can decide the question stated by petitioner it must first find that the law of Michigan on this issue conflicts with the Federal law and that the Court of Appeals so held. Whether or not there is a present conflict between the Courts of Appeals on this question is immaterial, for such conflict, if one exists, cannot be resolved by a decision in this case.

II.

The only question presented by this case is a factual one, i.e., an evaluation of the reasonable inferences that can be drawn from the evidence in the case. We have not discussed this factual question and will not attempt to do so here, because it is our belief that this Court is not, and should not be, concerned with a purely factual question which concerns solely the parties to this litigation. Thus, we have presented our argument in opposition to this petition for writ of certiorari on the premise that even were there some inconsistent statements the question as stated by petitioner is in fact not before this Court in this case. We think it sufficient to say in this regard that this factual question has previously been presented to the jury after proper instructions, to the District Court on petitioner's motions for judgment notwithstanding the verdict and for new trial, and to the Sixth Circuit Court of Appeals on appeal and on petition for rehearing; and in each case the question has been resolved against petitioner. Although the holding of the Court of Appeals on this point was only to the effect that there was a sufficient question of fact to properly submit the question to the jury (Court of Claims Opinion, Petition Appendix p. 9a), the decision of the District Court on petitioner's motions for judgment notwithstanding the verdict and new trial was much more than this. In the District Court's opinion denying these motions the District Judge, who was in the best position to evaluate the witnesses, the questioning and the arguments relative to this question, concluded as follows (R. 241a) (Appellant's Appendix filed in Court of Appeals):

> "An examination of the transcript of the proceeding in the course of the trial of this cause, including the evidence, the charge of the Court, and the argument of counsel, satisfied this Court that a fair trial was had, that the jury was fully apprised of the claims of the respective parties and the evidence in support thereof, that the jury was properly instructed as to the law which should be applied to the evidence and the Court should state in conclusion that the ver-

> dict of the jury was exactly the conclusion which the Court would have reached had it been the finder of the facts."

Petitioner is asking for nothing more in this Court than a redetermination of this factual issue. In this regard the statements of Justice Frankfurter in his dissenting opinion in *Dick vs. New York Life Ins. Co.*, supra, are of particular relevance. There Justice Frankfurter, joined in by Justice Whittaker, argued that certiorari had been improvidently granted where it became apparent that the only question in the case was the propriety of submitting certain questions to the jury and that this depended essentially upon an appreciation of the evidence, citing *Houston Oil Co. vs. Goodrich*, 245 U. S. 440. Justice Frankfurter then stated at page 457:

> "Alike in Congress and here it has been repeatedly insisted that a question like that raised by petitioner — was there sufficient evidence for submission to a jury — is not proper for review in this Court. The circumstances in the type of situation before us are infinite in their variety. Judicial judgments upon such circumstances are bound to vary with the particularities of the individual situation. The decision in each case is a strictly particular adjudication — a unique case since it turns on unique facts — and cannot have precedential value. Of course it is of interest, perhaps of great importance to the parties, but only as such and not independently of any general public interest."

CONCLUSION

For the reasons herein given, respondents pray that the petition for writ of certiorari be denied.

Respectfully submitted.

HAROLD S. SAWYER,
WARNER, NORCROSS & JUDD,
Business Address:
300 Michigan Trust Bldg.,
Grand Rapids 2, Michigan.

JOHN T. RYAN,
RYAN AND MCQUILLAN,
Business Address:
St. Joseph Sav. & Loan Bldg.,
St. Joseph, Michigan.

Attorneys for Respondents.